NO. 48836-1-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL DISTRICT NO. 10, d/b/a TACOMA PUBLIC SCHOOLS, individuals

Plaintiff,

v.

III BRANCHES, PLLC; KATHY MCGATLIN; SHEILA GAVIGAN, TRUBY PETE,

Defendants.

APPELLANT'S BRIEF

Michael A. Patterson, WSBA No. 7976
Onik'a I. Gilliam, WSBA No. 42711
Of Attorneys for Tacoma School District
PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS
2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

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II. INTRODUCTION

Tacoma School District ("District") appeals from the Honorable Superior Court Judge Helen Whitener's orders protecting from disclosure certain educational records of the District that were transferred to the Defendants in violation of the Family Education Rights and Privacy Act, 20 U.S.C. §1232g ("FERPA")(Order of January 15, 2016, CP 529, 6/10/16), despite an existing order from the Honorable (Ret.) Judge Thomas Larkin requiring they be disclosed to the District. See Ruling Denying Review, 11/3/2015, p.3. The District also appeals from the Superior Court's Order granting summary judgment to the Defendants based on the Court's erroneous conclusion that the privacy interests of the students whose records were at issue would not be implicated by the Defendants' continued possession of their educational records. CP 648-663, 6/10/16.

This case concerns three Employees of the Tacoma School District against whom the District was pursuing discipline action following their admissions that they disclosed to a non-District attorney student educational records and the attorney thereafter improperly redacted the records and provided them to the media, in violation of the Family Education Rights and Privacy Act, 20 U.S.C. §1232g ("FERPA"). The Superior Court's Orders are fundamentally flawed and should be reversed. First, the conclusion that the "attorney client privilege/confidentiality" would be violated by disclosure of student educational records to the original custodian of the records is wholly

unsupported by any legal precedent. There can be no attorney-client privilege in third-party documents that do not contain any attorney-client communications and, in fact, pre-existed the attorney-client relationship. Second, the conclusion that those educational records may not be returned to the school district because, in the balance, as long as the privacy interests of students are protected by purported redaction of personally identifiable information, district employees have unfettered discretion to disclose records to non-district attorneys as they see fit, is a grave error and distortion of the law specifically designed to prevent such uncontrolled disclosures. Given the above and as discussed further below, the District asks this Court to reverse and remand for further proceedings.

III. ASSIGNMENTS OF ERROR

1. The Superior Court Erred In Concluding that the Records Sought to Be Identified To the District Were Protected By the Attorney-Client Privilege Because They Were Not Produced in the Context of the Attorney-Client Relationship, They Pre-Existed any Such Relationship, and They Did Not Contain Communications of or Between Counsel and Client.

2. This Court Should Reverse the Superior Court's March 25, 2016, Order Granting Defendants' Motion for Summary Judgment Because the Erroneous Ruling Was Made In Contravention of Law and Accepted Rule of Stare Decisis.

IV. ISSUES OF ERROR

1 Did the Superior Court Error By Concluding That the Records Sought to be Identified to the District Were Protected By the Attorney-Client Privilege Even Though They Were Not Produced in the Context of the Attorney-Client Relationship, They Pre-Existed any Such Relationship, and They Did Not Contain Communications of or Between Counsel and Client?

2 Should This Court Reverse the Superior Court's Order Granting Defendants' Motion for Summary Judgment Because the Erroneous Ruling Was Made In Contravention of Law and Accepted Rule of Stare Decisis?

3 STATEMENT OF THE CASE

In or about August of 2014, Truby Pete, Shelia Gavigan, and Kathy McGatlin (referred to collectively as "Employees"), alone and in concert with each other, improperly removed from the District, private, protected, and confidential student educational records with personally identifiable information - including records that contained students' grade reports, transcripts, and class information - without parental or District consent. While the District has thus far been prevented from discerning the extent of the removal and disclosures due to the Employees' refusal to cooperate in the investigation, it was learned on September 3, 2014, that the Employees provided their attorney, Joan Mell of III Branches, PLLC, with unredacted copies of the records. CP 1-6; Ruling Denying Review, 4/8/2015. The District learned of these removals and disclosures following print and television news reports that expressly indicated student records had been provided to them by the

Employees. CP 1-6. In fact, in a televised KING 5 news report, student transcripts and student schedules with unofficial and crude redaction marks were actually displayed on the screen. *Id.* Notably, in the course of investigation, the employees did not deny that they had given protected student educational records to their attorney and, possibly, other third parties. Ruling denying review, 4/8/2015, p. 2-3.

The circumstances under which an educational agency, or school district, may release student educational records is dictated by the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) ("FERPA") and incorporated into Tacoma School District Policy 3231 and Regulation 3231R. *See* 20 U.S.C. 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents....").

The failure to comply with FERPA's strict dictates concerning to whom and under what circumstances release may be made subjects a school district to potential loss of federal funding. 20 U.S.C. § 1232g(b)(1)(A). In short, FERPA and it's regulations, 34 C.F.R. Part 99, make clear that educational agencies without prior consent may only disclose personally identifiable information from a student educational record to a school official with a legitimate educational interest or to a party performing services directly on behalf of and under direct control of the school district. 34 C.F.R. Part 99.31(a). Neither III Branches, PLLC, nor Joan

Mell are school officials or were acting on behalf of the District, as defined under 34 C.F.R. Part 99.31(a), District Policy 3231, or District Regulation 3231R and, thus, are not authorized by the District or the affected students and/or their parents to view, possess, or disclose any students' private and protected records without consent. While there is also a process allowed for investigative agencies to request and obtain access to student educational records under FERPA, 20 U.S.C. 1232g(b), there is no allegation here that Joan Mell and/or her private law firm, III Branches, PLLC, were acting in that capacity.

A. FERPA makes clear that providing a non-District attorney access to student records or information therein is a disclosure and that the only party entitled to redact the records is the educational agency.

FERPA regulations define a disclosure as "permit[ting] access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 C.F.R. Part 99.3. 34 C.F.R. Part 99.31 further explains that such a disclosure of personally identifiable information without student or parent consent can only be made to school officials, to include consultants or contractors, when under the *direct control* of the educational agency. 34 C.F.R. Part 99.31(a)(1). Personally identifiable information is not just limited to names and personal identifiers, but includes "other information that,

alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. Part 99.3. Thus, the regulations make clear that providing student grade reports and transcripts and identifiable facts regarding a student to a non-District attorney without consent is a disclosure of personally identifiable information in violation of FERPA. There is no statute, regulation, or case law stating otherwise.

On several occasions after learning of the disclosure, the District sought the employees' cooperation in returning the records and retrieving them from III Branches, to no avail. Accordingly, by letters on September 9, and 11, 2014, the Employees were directed to immediately return all protected student materials and information, including the unredacted student records originally disclosed to their attorney, Joan Mell. CP 1-6; p. 737-779. The Employees, however, did not return the records or otherwise respond. In communication dated September 24, 2014, the District reiterated that the Employees had improperly disclosed material and again referenced their obligation to return their records. *Id.* Having received no response to its three prior communications, on September 25, 2014, the District sent a letter warning that it would have no choice but to file a suit for replevin (return of property) and injunctive relief given the Employees' refusal to

respond or otherwise provide assurances the conduct would not be repeated and the Department of Education's mandate that school districts must take all reasonable and necessary steps to retrieve student data and prevent further disclosures. CP 1-6, p. 737-779. Again, the Employees did not respond. Finally, although the September 25, 2014, letter had warned a suit would be filed September 29, 2014, barring response, the District waited to file suit in Pierce County Superior Court until October 1, 2014. *Id.* And on October 1, 2014, the District was left with no choice but to file the Complaint for Replevin and Injunctive Relief. *Id.*

Rather than respond to the pending motions, however, the Appellants filed a Special Motion to Strike under RCW 4.24.525(5), commonly referred to as the Anti-SLAPP statute, and attaching close to 800 pages of documents in support. Ruling denying review. The Defendants however did not attach the student educational records that were the subject of the litigation in the first instance. Followed were months of hearings while the Parties argued about the scope of review for documents in support of the Special Motion to Strike. Specifically, the District wanted the review to include the unredacted and identifiable records the employees admitted disclosing to III Branches.[1] Ruling denying review. ("All [defense counsel] needs to do is hand over the

[1] Identification of the specific records at issue that were disclosed is not only relevant to the replevin action, but also so that the District may comply with its obligations under federal law to advise students and parents and maintain a record of when a disclosure has been made. *See* 20 U.S.C. § 1232g(b)(4)(A).

records that her clients have indicated they undisputedly they gave her in unredacted form."); *see also*, App. 73-74 ("[T]o the extent the Court is inclined to conduct any *in camera* review, the District would ask that it be of all the records and student information provided to Joan Mell and III Branches Law by the employees...").

Appellants, on the other hand, sought to limit the review to the records *after* they had been redacted by III Branches or to personnel records for which they had legitimate access and were not the subject of the lawsuit. Id. The dispute necessitated the appointment of a Special Master to review and process the over 12,500 pages of documents the Defendants sought to submit in support of their Special Motion to Strike.

On April 10, 2015, Judge Larkin held a hearing on the Special Motion to Strike and considered the Special Master's recommendations, as well as other pending matters. Ruling denying review, 11/3/2015. The trial court concluded that RCW 4.24.525(2) does not apply when a school district employee discloses student educational records, as defined under FERPA, to an attorney who is not an attorney for the District, and also denied the Special Motion to Strike. Accordingly, Judge Larkin ordered the employees to segregate and provide to the District all student educational records, as defined under FERPA, given to III Branches prior to October 1, 2014, in the original form provided to Joan Mell and/or III Branches. Id. After yet another petition for discretionary review, that this Court denied, the matter was remanded for trial, but was eventually assigned to Judge Helen Whitener. Id.

Judge Whitener initially ordered the records that were the subject of Judge Larkin's Order submitted under seal for *in camera* review. CP 525, 6/10/16. On review, however, the Court *sua sponte* overruled Judge Larkin's order and concluded that disclosure would "violate the attorney client privilege/confidentiality" and "may not be provided to the plaintiff school district." CP 529, 6/10/16. Thereafter, the Court granted the Defendants' Motion for Summary Judgment based on its conclusion that, although it is "preferred" that the courts review a request for educational records protected by FERPA, that "as long as the privacy interests of the students are safeguarded by redaction of identifiable student information before further dissemination," a person may disclose student records without a subpoena or court order to a non-district attorney without violating FERPA. CP 662, 6/10/16. This appeal followed.

ARGUMENT

The Superior Court's Order of January 15, 2016, was erroneous in that it disturbed, without basis, the prior order entered by Judge Larkin and because it is contrary to controlling Washington law governing the attorney-client privilege. The Order of March 25, 2016, granting summary judgment is also erroneous and subject to reversal because it is based on an incorrect application of law and is in contravention to federal law.

A. Standard of Review

"This court reviews summary judgment orders de novo. Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of

> any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. A material fact is one upon which the outcome of the litigation depends, in whole or in part. Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact."

Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wash. App. 309, 319–20, 111 P.3d 866 (2005); *see also*, CR 56(c).

When a summary judgment motion is predicated on a finding of attorney-client privileged,

B. The Superior Court Erred When It Barred Inquiry Into the Educational Records That The Defendants Admitted Had Been Disclosed To Third-Parties

In the course of considering the Defendants' Motion for Summary Judgment, the Court ordered Plaintiffs provide it with all the "documents, records, emails, and other information of and concerning students of the Tacoma School District that was provided to Joan Mell and III Branches Law prior to October 1, 2014," as had been ordered by Judge Larkin on April 10, 2015. Ruling denying Review, 11/3/2015, p. 11. On receipt, however, rather than honor Judge Larkin's Order and provide the District with the records, the Superior Court denied the

District access to the records on a finding they were protected by the attorney client/confidentiality privilege. CP 529, 6/10/16. Specifically, the Superior Court concluded that "Disclosure of the records filed under seal per 11-20-15 order...violates the attorney client privilege/confidentiality. These records may not be provided to the plaintiff school district." This ruling is contrary to prevailing Washington law on privilege and should be reversed. Further, because the ruling precludes return of the records that formed the basis for the replevin action in the first instance, the ruling prejudiced the District's opposition to the motion for summary judgment. Accordingly, this Court should reverse and remand for further proceedings.

Washington jurisprudence does not protect records "prepared for purposes other than communicating with an attorney," such as records generated in the course and scope of the Defendants' employment with the District or in furtherance of their educational duties and responsibilities. *Soter v. Cowles Publ'g Co.*, 162 Wn. 2d 716, 174 P.3d 60 (2007). In a thorough and lengthy discussion of the interplay between the attorney-client privilege and work-product protection, the *Soter* court confirmed that the privilege protection is intended to protect the communication of some information that would not otherwise be shared for fear of discovery. *Soter*, 162 Wn. 2d at 745 ("privilege applies to communications and advice between an attorney and client and extends to documents that *contain* a privileged communication.")

The subject records are indisputably student educational records as defined under FERPA, and maintained by the District and its staff pursuant to its legal obligations under FERPA. They do not contain client communications from or to the Petitioners, and pre-existed and exist independently of any attorney-client relationship the Petitioners may enjoy with each other and, thus, are not privileged communications. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (attorney-client privilege includes communications **between** a client and her attorney, as well as documents **containing** privileged communications). Petitioners did not and do not cite to any controlling law that would require a contrary conclusion. As such, the student educational records are not protected by any attorney-client privilege. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 213 P.3d 596 (2009) (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439 (2004) (privilege does not extend to documents that are prepared by third parties or for some other purpose than communicating with an attorney).

C. Superior Court's Summary Judgement Ruling Should be Vacated Because the Erroneous Ruling Was Made In Contravention of Law and Accepted Rule of Stare Decisis

As an initial matter, the doctrine of Stare Decisis precluded the *sua sponte* reconsideration that occurred when the Superior Court entered a ruling contrary to a governing order and without a showing of error.

The principle of stare decisis compels our courts to uphold prior decisions in the absence of proof that doing so would be incorrect and harmful. *In re Detention of Campbell*, 139 Wash.2d 341, 348, 986 P.2d 771 (1999) ; *see also, In re Stranger Creek & Tributaries in Stevens Cty.*, 77 Wash. 2d 649, 653, 466 P.2d 508 (1970) ("Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office.'). In this case, the Superior Court reconsidered Judge Larkin's prior ruling without cause and erroneously so. On that basis alone, this Court should vacate and remand for reinstatement of Judge Larkin's Order and proceedings in keeping with that Order. Alternatively the Court should vacate because summary judgment was predicated on the Superior Court's erroneous application of FERPA.

To be clear, the Complaint did not allege a cause of action under FERPA; it alleged a cause of action under RCW 7.64.020 for the return of property (in this case, educational records) to which the District is lawfully entitled to possess. FERPA was referenced as the authority under which the District possesses and maintains those educational records and to establish that the Defendants did not have a proper claim to possess the educational records of the students at issue. The Superior Court did not find that the District's strength of title to or right to possess the records which it is obligated to maintain under FERPA was not

established. Thus, the Superior Court's apparent assertion that, because there is no private cause of action for violation of FERPA replevin does not provide a remedy, is in error. CP 662, 6/10/16.

The Court concluded that, despite having identified that the preferred method for disclosure is through the courts for a balancing analysis, it seemed "intuitive" that a "person seeking legal representation who obtains and provides student records without a subpoena or court order to an attorney is not violating FERPA as long as the privacy interests of the students is safeguarded by redaction of identifiable student information before further dissemination." Id. No statute, regulation, or case law is cited in support of this novel proposition.

Particularly troubling about this leap in logic is that the Court initially outlined all the concerns regarding the unrestricted release and disclosure of educational records that necessitated the enactment of FERPA (CP 658-659, 6/10/16) and the limited circumstances under which a disclosure may be allowed (CP 660, 6/10/16), but then undermines the law by, without legal support, granting an unwarranted exception to its application. For example, after initially noting that the unrestricted release or disclosure of educational records may be allowed on subpoena or court order, the Court cites a standard of review for such unrestricted release of educational records:[2]

[2] Appellant does not, by reference, adopt or affirm that this is the proper standard of review to determine whether FERPA-protected educational records should be disclosed. It is cited solely to establish error, where the Court relied on this standard but then failed to apply it.

> "...[P]rior to the issuance of a judicial order or subpoena requiring disclosure of a child's educational records, courts require that a defendant articulate, in good faith, a specific need for the information contained in the records, and then require that a trial court then balance the defendant's need for the information with the privacy interests of the student and her parents. A non-exclusive list of factors the court should consider includes: the nature of the information sought, the relationship between this information and the issue in dispute, and the harm that may result from the disclosure."
>
> CP 660, 6/10/16.

The Court further notes that "FERPA specifically allows release of records in compliance with a court order or lawfully issued subpoena, provided that affected students and their parents are notified prior to the institution's compliance." CP 661, 6/10/16. The Court reiterates these standards by noting that "the preferred method of obtaining student educational records is through the courts where a balancing analysis can be done to 'minimize intrusion on the privacy interests protected by FERPA." Id. Thereafter, however, the Court wholly fails to engage in this analysis prior to its novel conclusion that a prospective client may disclose educational records to a non-district attorney without violating FERPA. Paradoxically, the Court has concluded that disclosure pursuant to a court order is held to a higher standard than that required before an employee may make an ad hoc decision to disclose records to a non-judicial officer without a stated need for the records.

Similarly, the Court agreed that the preferred method is through the courts, but then concludes, without reference, that it is not the exclusive means to receive records. The Court found the District's

argument that it was the only party with authority to disclose student records "unpersuasive,"[3] yet did not cite to any authority as to why the clear dictates of the regulations would not apply. CP 662, 6/10/16.

After determining that intuition supports eschewing the laws that govern the disclosure of student records, the Court then concludes that there is no FERPA violation because "the attorney prior to further dissemination of the students' information redacted identifiable student information." Second, as previously stated, under FERPA, the only entities that may redact educational records are the district who maintains the records and those who have legitimately received the records under the statute. 34 C.F.R. 99.31(b)(1). Thus, a party that receives the records in violation of FERPA may not then use FERPA to argue that it is an entity in possession of the records entitled to redact. The rule is also in force to ensure that parties with expertise and training are responsible for the redaction. This would avoid what in fact occurred in this case: which is that crudely redacted records with black mark redactions appeared on an evening news report. Importantly, the Defendants have never claimed that the disclosure to King 5 is the only disclosure to a third-party.

There is simply no basis for why the balancing standards stated by the Court did not apply in this instance. The Court did not find that

[3] The Court appears to have conflated two arguments made by the District. One, that under 34 C.F.R. Part 99.3, it was the only entity with authority under FERPA to redact and disclose records. Two, that non-district attorneys are not consultants under the control of the school district such that they can receive unredacted records under34 C.F.R. Part 99.31(a)(1).

the records at issue were not of the kind that qualify as educational records under FERPA, indeed, the Court found that "many, but not all, of the records at issue are 'student educational records' under FERPA and, therefore, unrestricted release/disclosure of those records is prohibited under FERPA." CP 660, 6/10/16.

Most disturbing, however, is that the Court's order now grants authority to any non-district attorney to solicit and receive protected educational records from prospective clients without process and a specific need, notwithstanding federal and state laws expressly prohibiting that disclosure. This is an untenable state of the law and is not what the clear terms of FERPA require. Accordingly this Court is asked to reverse.

CONCLUSION

For all the foregoing reasons, the District respectfully requests that this Court reverse the Superior Court's erroneous grant of summary judgment and remand for proceedings consistent with its opinion, including immediate disclosure to the District of the records that had been taken prior to October 1, 2014, and disclosed to third parties in violation of the law.

RESPECTFULLY SUBMITTED this 26th day of August, 2016

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS

By: s/*Onik'a I. Gilliam*
Michael. A. Patterson, WSBA No. 7976
Onik'a I. Gilliam, WSBA No. 42711
Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Angela Marino, hereby declare that on this 26th day of August, 2016, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated below:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Washington State Court of Appeals, Division II 950 Broadway, Ste. 300 MS TB-06 Tacoma, WA 98402-4454	☐ Electronic Mail ☐ ABC Legal Messenger Service ☒ Regular U.S. Mail ☐ Other: _____
Ms. Joan K. Mell, WSBA No. 21319 III Branches, PLLC 1033 Regents Blvd., Suite 101 Fircrest, WA 98466 Emails: joan@3brancheslaw.com misty@3brancheslaw.com	☒ Electronic Mail ☐ ABC Legal Messenger Service ☐ Regular U.S. Mail ☐ Other: _____
Mr. Wayne C. Fricke WSBA No. 16550 Hester Law Group Inc., P.S. 10087 S. Yakima Ave STE 302 Tacoma, WA 98405 Email: wayne@hesterlawgroup.com kathy@hesterlawgroup.com	☒ Electronic Mail ☐ ABC Legal Messenger Service ☐ Regular U.S. Mail ☐ Other:

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 26th day of August, 2016, at Seattle, Washington.

s/*Angela Marino*
Angela Marino
Legal Assistant